No. 14645

United States Court of Appeals
For the Ninth Circuit

FRED I. PUTMAN and JAMES A. OVERMAN, *Appellants,*

vs.

HARRY C. LOWER, JOHN KADLEC, GEORGE S. HERNING, EDGAR L. PEECHER, WILLIAM E. BARQUIST and NORMAN L. BUNKER, *Appellees.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLEES

M. BAYARD CRUTCHER,
BOGLE, BOGLE & GATES,
Proctors for Appellees.

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INDEX

TABLE OF CASES

TEXTS

STATUTES

RULES

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BRIEF OF APPELLEES

STATEMENT OF JURISDICTION

These suits were brought by crewmembers against vessel and owner for wrongful discharge and for wages due —they were properly brought in admiralty

The original libel and four intervening libels in this case were filed in the United States District Court for the Western District of Washington, Northern Division, by former members of the crew of the fishing vessel SILVER SPRAY. These men—the appellees here—alleged that they had been hired by the SILVER SPRAY's owner to fish on shares for the 1954 tuna season, and that the owner had wrongfully discharged them (Libels: Lower, Tr. 4, 5, pars. III, V, VII; Herning, Tr. 28, 29, pars. III, V, VII; Peecher, Tr. 24, 25, pars. III,

V, VII; Barquist, Tr. 21, 22, pars. III, V, VII; Bunker, Tr. 17, 18, pars. III, V).

One crewmember, Kadlec, was permitted to amend his claim to conform to the proof (Tr. 214), and showed that he had earned agreed wages of $100.00 a week while working aboard the SILVER SPRAY, which were unpaid. He did not claim any wrongful discharge.

The respondent vessel SILVER SPRAY was regularly seized pursuant to the prayer of Lower's libel (Tr. 7, 8). The respondent owner, Robert J. Tobin, appeared in the actions to claim and defend the vessel (Tr. 46 *et seq.*).

The appellants, who held a preferred ship mortgage on the vessel, intervened for their interest (Tr. 33 *et seq.*).

The trial court found, in answer to the same arguments now being advanced upon appeal, that these libelant crewmembers had valid causes of action for damages, both against the SILVER SPRAY and against her owner (Findings XVII, XVIII, Tr. 68), and that they had maritime liens for their respective damages, of the same nature and rank as for seamen's wages (Findings XX, XXI, Tr. 69).

The district court properly concluded that this proceeding was within its admiralty and maritime jurisdiction (Conclusion I, Tr. 73), and entered a decree awarding damages to each of the libelant crewmembers against both the SILVER SPRAY and its owner (Tr. 78, 79). The court likewise decreed foreclosure of appellants' mortgage, with costs (Tr. 79, 80), but subordinated their lien (Tr. 81).

The vessel was subsequently sold by the Marshal, for a sum much less than the judgments against her (Tr. 87). The proceeds remain in the registry of the court, the decree for the crewmembers having been superseded by the appellant mortgagees (Tr. 88).

STATEMENT OF THE CASE

Since the statement by appellants is not correlated to the pleadings or the findings, and does not fairly summarize the status of this case on appeal, we are obliged to provide a statement of our own.

1. The Suits for Wrongful Discharge

As previously noted, the appellees Lower, Herning, Peecher, Barquist and Bunker were hired on shares by the owner of the vessel SILVER SPRAY to fish for tuna during the 1954 season, off the coast of Southern California (Findings III, V, VII, IX, XI, Tr. 64, 65, 66).

They went to work aboard this vessel, each at a different time (Findings IV, VI, VIII, X, XII, Tr. 64, 65, 66).

Thereafter the respondent owner and operator, Tobin, abandoned the vessel and the fishing enterprise, effecting a wrongful discharge of these men (Finding XV, Tr. 67). This abandonment was through no fault of the crewmembers (Finding XVI, Tr. 68).

The case is unusual in several respects.

First, the vessel owner did not seek fishermen in the customary way. He solicited them through newspaper advertisements (Tr. 96, 133, 144, 161, 192, 225).

A typical want ad is in evidence as Exhibit 3:

"Commercial Fishing

"Tuna boat leaving for southern waters, $2,-500.00 required. No investment risk. Must be dependable. Write 17-40 Times."

As this ad implies, each of the appellees was required to advance funds to the vessel owner as a condition of employment (Exs. A-1, A-5, A-6, A-7, A-8; Tr. 259, 260). Mr. Tobin explained at the trial that the purpose of this money was to outfit, provision and operate the SILVER SPRAY (Tr. 251). Such advances did not give the crewmembers any right or interest in the vessel itself (Tr. 247), or even any voice in its management ("working share agreement," Tr. 50, clauses 2, 3, 4).

A second unusual fact is that the vessel owner did not "fire" any of the libelants—he first ignored the agreements he had made with them, and then actually abandoned them.

Instead of taking the SILVER SPRAY south to fish, he took it north to Alaska, for a "shakedown" and supposedly to pick up a load of shrimp at Wrangell (Tr. 99, 236). This was not a voluntary departure, so far as most of the sharesmen were concerned.[1] Tobin debarked before they reached Wrangell (Tr. 112), and when no load of shrimp materialized (Tr. 194, 195) he instructed the master to look for cargo to haul *in Alaska* and then flew south (Tr. 102). The crew heard from the

[1] HERNING was not asked whether he would agree to go to Alaska (Tr. 147). PEECHER objected to Tobin that wasn't what he came aboard for; "I come aboard the ship to go to San Diego on a tuna fishing trip" (Tr. 166). BARQUIST was not asked; "I didn't have any say about it" (Tr. 194). LOWER consented to go north, with the understanding the vessel would return and go tuna fishing (Tr. 111). BUNKER had not yet been hired.

master that Tobin had "ditched" them (Tr. 140). This was what they believed (Tr. 176).

While Tobin pretended to pick up the tuna venture later (Ex. A-2), actually he did nothing (Tr. 254, 255). When the SILVER SPRAY arrived back in Seattle on June 3, 1954, he covertly removed his personal effects (Tr. 136, 169, 196) and retreated to Spokane. Tobin's business agent suggested that the crewmembers "incorporate" (Tr. 106). Tobin could not be reached (Tr. 107, 128). Even his agent had a difficult time in getting him back to Seattle for a final meeting with members of the crew (Tr. 273).

When Tobin finally did come back on June 7, three weeks after the scheduled departure for San Diego (Tr. 97), Barquist asked him, "What are we going to do now?" Tobin only answered, "Go up to my attorney and get your money" (Tr. 197).[2]

Lower filed the first libel, three days later (Tr. 7), and the other crewmembers followed suit.

The other unusual aspect of this case, is, of course, that the fish catch which was to compensate the crewmembers under their agreements with the vessel owner was entirely prospective.

(a) The issue of jurisdiction

In his Answer, the vessel owner set up certain terms of the contracts originally signed by each of these crewmembers (Exs. A-1, A-5, A-6, A-7, A-8) as an affirmative defense to their claims (Tr. 47, 49, 50, 51).

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[2] Tobin's own witness confirmed this (Tr. 273). All that BARQUIST got from the lawyer was a legal opinion (Tr. 198).

Crewmember Lower replied, alleging that Tobin had made certain material representations to induce him to sign the contract (Tr. 52, par. II). The reply continued:

> "The aforesaid representations by respondent were false, and were made by him with intent to deceive libelant so that the said writing prepared by respondent and then executed by libelant as aforesaid, and as alleged by respondent in answer to the libel, is null and void, and of no effect." (Tr. 53, par. III)

Similar replies were made by the intervening libelants Bunker (Tr. 55, 56, pars. II, III), Peecher (Tr. 59, 60, pars. II, III) and Barquist (Tr. 61, 62, pars. II, III).[3]

It will be readily apparent, from the foregoing, that the issue of deceit was raised to dispute the respondent vessel owner's contention that the alleged contracts represented the true agreement with each of these crewmembers.

Appllants contend, in sweeping generalities, that because this incidental issue of deceit was raised, and because on cross-examination some of the crewmembers admitted they thought Tobin had cheated them, and that they wanted back the money they had given him, the whole character of the crew's claims was changed into a common law action for fraud and deceit (Brief, pages 14 *et seq.*).

The trial court concluded that the crewmembers were entitled to their remedy in admiralty (Oral opinion, Tr. 279, 280), and so found (Findings XVII, XVIII, XIX, Tr. 68).

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[3] Crewmember HERNING is not concerned with this question, since he did not make such an allegation in his reply (Tr. 57).

(b) Appellants contend that fishermen on shares, wrongfully discharged, cannot libel their ship before the end of the season, and that in any event they have no maritime lien for their damages

As previously noted, the trial court held that the libelant crewmembers had maritime liens for their respective damages, of the same nature and rank as for seamen's wages (Findings XX, XI, Tr. 69).

Appellants contest this ruling, on two grounds:

(1) The damages related to prospective fishing after the date the SILVER SPRAY was seized (Brief, p. 20 *et seq.*).

(2) The measure of damages is speculative (Brief, page 20).

(c) Appellants contend that the damages for wrongful discharge were not proven

The trial court found that these crewmembers had been employed under certain terms. The SILVER SPRAY was to be equipped as a clipper, with fresh bait tanks and refrigeration. It was to fish for tuna throughout the 1954 tuna season, operating from Southern California. Each man was to receive one-tenth of the season's catch as his share (Findings III, V, VII, IX, XI, Tr. 64, 65, 66).

The court further found that the measure of damages for wrongful discharge was the prospective value of a share in the catch which might reasonably have been expected had Tobin fulfilled his agreements (Oral opinion, Tr. 280), and fixed that value at $7,500.00 (Finding XX, Tr. 69).

The actual damages awarded took into account individual earnings and prospective earnings from other sources up to the end of the tuna season (Finding XXII, Tr. 69, 70; Stipulation, Tr. 292, 293).

Appellants attack Finding XX (the value of each prospective share), implying at page 26, of their brief that there was no substantial evidence upon which to base the figure of $7,500.00, and asserting that the Finding does not suffice under Admiralty Rule 46½, 28 U.S.C.A.

2. The Suit for Unpaid Wages

One crewmember, Kadlec, was not hired for the entire tuna season, nor would he have been entitled to a share of the catch. As has been previously noted, he was hired for wages, and maintained his action at the trial of this case to recover the unpaid balance. He prevailed (Findings XIII, XIV, Tr. 67).

Appellants make an argument that these findings are contrary to "the preponderance of the evidence" (Brief, pages 26 *et seq.*).

ARGUMENT

1. The findings of fact are supported by substantial evidence. Particularly,

(a) there is convincing evidence of the prospective fishing shares which would have been earned had the vessel owner fulfilled his agreements, based upon minimum average catches of similar tuna boats in prior years; and

(b) the finding thereon was sufficient in form, under a late decision of this court, *Griffith v. Gardner*, 196 F.2d 698;

(c) the wage agreement with appellee Kadlec was clearly proven—Tobin's testimony on this point was preposterous.

2. The trial court properly applied the law.

(a) The fact that the vessel owner has deceived or cheated his crew does not exclude them from their admiralty remedy for wrongful discharge. Admiralty's traditional solicitude for seamen makes this conclusion obvious. Appellants cite no case even suggesting their contrary view.

(b) Appellees have a maritime lien for their damages.

(1) That fact that the vessel is attached before the end of the fishing season is immaterial, since the wrongful discharges were effected before, and not as a result of, the attachment. A seaman has a lien for his damages for wrongful discharge, which he can enforce immediately. *Vlavianos v. The Cypress*, 4th Cir., 171 F.2d 435. The fact that damages relate to prospective earnings after attachment is immaterial. *The Heroe*, D.Dela., 21 Fed. 525.

(2) The trial court followed prior decisions of this

court, and other respected admiralty precedents, in estimating damages by reference to prospective catches. *Carbone v. Ursich*, 209 F.2d 178; *Van Camp Sea Food Co. v. DiLeva*, 171 F.2d 454, and *United States v. Laflin*, 24 F.2d 683, all allowed such damages. Dictum to the contrary in the majority opinion of *Old Point Fish Co. v. Haywood*, 4th Cir., 109 F.2d 703, is neither authoritative nor persuasive.

I. The Findings of Fact Are Supported by Substantial Evidence

We note at the outset that appellants have failed to comply with Rule 18. 2. (d) of this Court, requiring that where findings are attacked the appellants state particularly in the specification of errors wherein the findings are alleged to be erroneous.

Not one of the specifications refers particularly to the alleged error in any given finding of fact by the trial court (except perhaps Findings XIII and XX), nor is any specification mentioned in appellants' argument.

Under these circumstances appellees should not be required to assume the burden of justifying each finding by reference to the many items of evidence which go to make it up, merely because the appellants pick at it indirectly with generalities and fragments of testimony.

All of the witnesses testified in open court. The testimony of the libelant crewmembers abundantly supported the findings by the trial court (a) that they were individually hired to work aboard the SILVER SPRAY on shares, upon the terms stated in the Findings, (b) that they went to work on the vessel and (c) that the owner soon afterwards left the SILVER SPRAY, in Alaska, and

by his actions thereafter showed that he did not intend to return or to put the vessel to tuna fishing.[4]

We do not understand that the appellants themselves seriously question these basic findings. They say that they are impartial to the differences between owner and crewmembers, and that this can only affect the remedy of the crew against Tobin personally (Brief, pages 13, 14).

A. There is substantial evidence to support the finding of damages for wrongful discharge

The first finding of fact specifically pointed out and challenged by appellants is Finding XX, at pages 23 *et seq.* of their brief.

The relevant part of this Finding reads as follows:

> "That the value of each of said shares referred to in finding number XV was and is the sum of $7,500.00, * * *."

Appellants complain (specification 3, Tr. 84) that the crewmembers failed to prove *any* damages.

Following is a summary of evidence as to the prospective tuna catch of the SILVER SPRAY, had her owner carried out his agreements with the crew.

(a) *Capacity*—The SILVER SPRAY had a hold capacity of approximately 70 cubic tons (Tr. 205).

(b) *Equipment*—This vessel was represented to the crewmembers as a clipper (Exs. A-1, A-5, A-6, A-7,

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[4] This general statement is not accurate as to libelant BUNKER. He was not hired until June 2, 1954, and he went aboard the vessel only on June 3, the day that the SILVER SPRAY arrived back in Seattle (Findings XI, XII, Tr. 66). However, his situation is essentially the same.

A-8), which means that she was to be fitted with tanks to carry live bait, and, normally, refrigeration (Tr. 181). The owner represented to the crew members, when he hired them, that the SILVER SPRAY was to be so fitted (Lower, Tr. 97; Herning, Tr. 145; Peecher, Tr. 162; Barquist, Tr. 192; Bunker, Tr. 206). This proper equipping of the vessel was indeed an integral part of the hiring agreements (Findings III, V, VII, IX, XI, Tr. 64, 65, 66).

(c) *Experience*—The vessel owner represented that he had had several years of commercial fishing experience (Tr. 210). He told the libelants that two experienced tuna fishermen would be aboard (Tr. 147, 162, 163, 193, 194).

The libelants themselves had had no tuna fishing experience, but they were well equipped to handle the ship. Herning had been a commercial fisherman (Tr. 143). He also had experience with diesel engines, and served as engineer (Tr. 143, 146). Bunker was a licensed master (Tr. 204). Lower and Barquist had both had sea experience in the Navy (Tr. 96, 191). Peecher was quite familiar with vessels (Tr. 161). Kadlec had served briefly in the merchant marine (Tr. 133).

The one voyage that these men made as a crew was well handled, as the owner himself stated (Ex. A-9).

(d) *Market*—As to every libelant crewmember, the vessel owner, Tobin, represented that he had a contract with Van Camp Sea Food Company's cannery in San Diego, for tuna fishing (Tr. 97, 145, 162, 192, 206).

(e) *Size and nature of prospective catch*—An expert

witness, Hervey Petrich, testified for the libelant crewmembers. The following points were established.

Tuna clippers the size of the SILVER SPRAY are being operated in this industry (Tr. 182). The average catch for vessels of this size varies from 250 tons to 300 tons per season (Tr. 184). The catch consists of both yellow fin and skip jack, in the proportion of about 40-60 (Tr. 184, 186).

The run of tuna off the coast of Southern California in 1954—up to the time of trial in the middle of September—had been exceptionally good (Tr. 185).

(f) *Price of prospective catch*—The witness Petrich established that the 1952-1953 average market price for yellow fin and skip jack combined was about $300 per ton (Tr. 184, 185, 186). The 1955 average market price up to July 27 of 1954 was up, "higher than it has practically ever been in the industry" (Tr. 185, 186). Since that date, it had remained at the level of previous years' averages (Tr. 186).

(g) *Computation of shares*—The trial court did not announce how it computed the damages, but the following computation is clearly within the evidence:

250 tons (minimum average season catch for vessels of this size) x $300 (1952-1953 average price for yellow fin and skip jack) equals $75,000, of which, under his agreements, the owner was to pay the sharesmen one-tenth each (Findings III, V, VII, IX, XI, Tr. 64, 65, 66), or $7,500.

This figure conforms to estimates which the vessel owner himself made to one of the crew members—"anywhere from $7,500 to $12,000 a year" (Tr. 199).

(h) *Conclusion*—There is probative and substantial evidence in the record to support the trial court's figure of $7,500 as the reasonable value of a one-tenth share of the SILVER SPRAY's catch had her owner carried out his actual agreements with the libelant crewmembers.

Moreover, appellants are scarcely in a position to object to the findings on prospective fishing. Although they were former owners of the vessel they neither took the witness stand nor offered any evidence whatsoever to aid the court on this difficult question.

B. The finding of damages is sufficient under General Admiralty Rule 46½

Appellants assert that Finding XX (Tr. 69) does not comply with Rule 46½ of the Supreme Court Rules of Practice in Admiralty, 28 USCA (Specification 10, Tr. 85; Brief, pages 25, 26).

This Rule provides:

> "In deciding cases of admiralty and maritime jurisdiction the court of first instance shall find the facts specially and state separately its conclusions of law thereon; * * *."

The apparent objection is that the trial court did not explain the factors which entered into its estimate of the prospective catch. But no such explanation is required of a district court in its findings.

In *Griffith v. Gardner,* 9th Cir., 1952, 196 F.2d 698 (wrongful death and personal injury suit against excursion-boat owner), the district court's findings were challenged as being only an expression of its ultimate

conclusions from the evidence. Appellants claimed that the court was avoiding the requirements of Admiralty Rule 46½.

In rejecting appellants' argument, this Court made a clear statement of the function of a finding of fact.

> " * * * The phrase 'finding of fact' may, and in this case we think does, reflect the ultimate judgment of the court on a mass of details involving not merely trustworthiness of witnesses but other appropriate inferences that were drawn from living testimony which elude proof in a cold appellate record. A finding of fact depends on the nature of the materials on which the finding is based and the expression itself may be a summary characterization of complicated factors of varying significance for judgment. Thus, a conclusion by way of reasonable inference from the evidence, is a 'finding of fact.' " 196 F.2d 701.

This ruling follows the decision from the Second Circuit, *Petterson Lighterage & T. Corp. v. New York Central R. Co.,* 2d Cir., 1942, 126 F.2d 992 (collision):

> "Findings should not be discursive; they should not state the evidence or any of the reasoning upon the evidence; they should be categorical and confined to those propositions of fact which fit upon the relevant propositions of law." 126 F.2d 996.

C. There is substantial evidence to prove Kadlec's wage agreement

The other Finding of Fact specifically pointed out and challenged by appellants is Finding XIII, their Brief, pages 26 *et seq.*

This finding is as follows:

"That on or about April 28, 1954, the intervening libelant John Kadlec commenced working on board the said vessel at the Port of Seattle as a member of its crew, for an agreed wage of $100 per week. That the said intervening libelant thereafter continued to serve on board said vessel as a member of its crew until on or about June 3, 1954." (Tr. 67)

Appellants complain that the proof of this agreement is against the preponderance of the credible evidence (Specification 15, Tr. 86).

In fact, the wage agreement to which Kadlec testified was the only sensible explanation for what happened.

Kadlec paid Tobin $500 for a "working share" in the fishing vessel SOCKEYE, *i.e.,* a one-third share of the catch (Tr. 225; Ex. A-10).

Kadlec testified to his meeting with Tobin, and continued:

"Then Mr. Tobin showed me a picture of the SILVER SPRAY. He said: 'I am planning on purchasing this boat.' And he was telling me all about what a good boat—and he said: 'If I decide to put you on this boat, that is where you will be,' he said, 'because you only have $500.00 in this, and I want to put you wherever you are needed.' * * * (Tr. 138, 139)

Q. (Cross-examination by Mr. Collins) Well, excuse me. On the morning of the 14th you gave him $500.00, and you signed a contract on the SOCKEYE, and that was the entire conversation at that time?

A. Mr. Tobin also told me that if he decided to put me on this SILVER SPRAY, which he showed me a picture of, that I would work for $100.00 a week. * * * " (Tr. 139)

Two weeks later Kadlec went to work for Tobin on the SILVER SPRAY, approximately April 28, 1954 (Tr. 134). He was assistant engineer on the voyage to Ketchikan, standing a regular watch (Tr. 134). He served a regular watch as helmsman during the remainder of his service, until June 3, 1954, when the vessel arrived back in Seattle (Tr. 135, 104).

He was not formally discharged; he simply could not find Tobin (Tr. 136). The only pay he had received was an advance of $5.00 (Tr. 135).

At the trial the vessel owner took the remarkable position that Kadlec had no wage claim (Tr. 225, 251)—that Kadlec was simply volunteering his services (Tr. 251)!

The only explanation proffered by Tobin for this phenomenon was that Kadlec had a wonderful attitude (Tr. 225).

It is small wonder that the trial court believed Kadlec rather than Tobin (Oral opinion, Tr. 278).

II. The Trial Court Properly Applied the Law

A. An incidental issue of deceit did not defeat the court's admiralty jurisdiction

The affirmative allegations of deceit by the libelant crewmembers[5] were made only to avoid the respondent Tobin's alleged defenses under the terms of his "working share and contract." See pages 5, 6, *supra*.

This move by the libelants was made to avoid the rule

[5] The following argument does not apply to HERNING, who did not make such an allegation, nor to KADLEC, who relied simply upon an oral wage agreement with the vessel owner.

against parol evidence, which might otherwise have prevented them from testifying as to the true terms of their respective engagements.

For example, Clause 4 of the "working share and contract" (Tr. 50) might have excluded proof of the alleged understanding between Tobin and Lower, that the SILVER SPRAY was to leave on about May 15, 1954, for the season's tuna fishing off the coast of Southern California (Libel, par. III, Tr. 4).

Upon the trial, however, neither Tobin nor the appellants offered any objection to the testimony given by the crewmembers.

The question of deceit, therefore, as a legal issue, became irrelevant. Only the appellants sought to continue it as an issue, on cross-examination of the libelants (*e.g.*, Tr. 122, 123, 124, 158, 178, 203, 212).

The trial court commented upon appellants' efforts to change the nature of the suit, in its oral opinion (quoted in appellants' brief, pages 16, 17).

The jurisdiction of the district court to entertain the suit of a seaman for wrongful discharge, as an admiralty matter, is clear. The fact that he may be a fisherman on a share makes no difference, for this purpose.[6]

The American Beauty, W.D. Wash., 1924, 295 Fed. 513, was a suit in admiralty by fishermen on shares, for

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[6] The essential equality of seamen on wages and fishermen on shares, in admiralty, has been frequently affirmed. *Strom v. The Montague,* W.D. Wash., 1943, 53 F.Supp. 548, 1944 AMC 122 (suit for share plus maintenance and cure) is illustrative. The right of sharesmen to enforce their claims on an equal footing with crewmembers on wages has been expressly sustained. *The Grace Darling,* D.Me., 1878, 10 Fed. Cas. No. 5,651, p. 895 (suit for unpaid shares and wages).

damages due to their wrongful discharge. No one questioned jurisdiction. Judge Neterer awarded the fishermen the value of their shares to the end of the season, less their net earnings from other work. *The Page,* D. Cal., 18 Fed. Cas. No. 10,660, p. 977, is another such case, in which jurisdiction was not questioned.

Appellants rely on *Home Insurance Company v. Merchants Transportation Company,* 9th Cir., 1926, 16 F.2d 372, and *Westfall Larson & Co. v. Allman Hubble Tug Boat Co.,* 9th Cir., 1934, 73 F.2d 200, neither of which concern seamen.

In *Westfall Larson & Co.,* appellant had had to pay state court judgments for damage inflicted by its vessel on a bridge and power cable. It sought indemnity from the tug owner in an action in admiralty. This court affirmed the decree dismissing for want of jurisdiction, noting that the damage arose from what was at that time a nonmaritime tort. 73 F.2d 205.

In the *Home Insurance Company* case, appellant had paid claims under marine policies. It later sued the insured, in admiralty, to recover its payments. This court characterized the proceedings in the following language:

> "[This] is an action growing out of certain alleged inequitable acts of the appellee, and primarily its purpose is to recover money obtained by means of fraud and false representations." 16 F.2d 374.

Such a cause was held to be outside the admiralty jurisdiction.

Certainly neither of these decisions is helpful to appellants. The *Home Insurance Company* case could be

relevant only if our suit had been tried and decided on the theory that libelants were seeking recovery of the working funds they had advanced to the vessel owner. No such claims were alleged, either in the libels or in the replies. No such claims were asserted by the proctors for the libelants, upon the trial.[7]

Only Mr. Carey, then the proctor for appellants, tried to make this into an action for fraud and deceit (*e.g.,* Tr. 122, 158, 219).

The criterion of admiralty jurisdiction indicated by this Court in the *Home Insurance Company* case is as follows:

> "Jurisdiction in admiralty in cases of contract depends upon the nature of the contract, 'and is limited to contracts, claims, and services purely maritime and touching the rights and duties appertaining to commerce and navigation.' The Eclipse, 135 U.S. 599, 608, 10 S.Ct. 873, 34 L.Ed. 269." 16 F.2d, at page 373.

That the contracts of crewmembers with the owner of a fishing vessel are maritime in nature is so elemental that detailed citation of authorities would serve no purpose.

Benedict on Admiralty (6th ed., 1940) §61, commencing the discussion of maritime contracts, states generally:

> "The mariners of a ship are commonly said to be wards of the admiralty. Their wages, their rights,

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[7] Appellants assert in their brief, page 2, that "appellees brought the proceedings as a means to recover their original investments on the grounds that Tobin extracted monies through fraud and deceit." There is nothing to justify such an assertion.

> their wrongs and injuries have always been a special subject of the admiralty jurisdiction." Vol. 1, page 124.

A late opinion of this Court dealing with the rights of fishermen on shares, speaks of "the familiar principle that seamen are the favorites of admiralty and their economic interests entitled to the fullest possible legal protection." *Carbone v. Ursich,* 9th Cir., 1953, 209 F.2d 178, 182.

It would be astonishing if an admiralty court should refuse to help seamen simply because the shipowner had defrauded or cheated them.

A recent district court decision, in a case where the shipowner sold passenger tickets knowing that the vessel would never make the trip, is abundant proof that the admiralty court does not refuse an *admiralty remedy* simply because the defaulting party perpetrated a fraud. *Archawski v. Hanioti,* SDNY, 1955, 129 F.Supp. 410.

A very old case, which has been frequently cited in cases dealing with wrongful discharge, *Hoyt v. Wildfire,* NY, 3 Johns. 518, dealt with fraud by the shipowner, resulting in the wrongful discharge of the crew. The seamen had shipped on a voyage from New York to Bombay. The master deviated from his course under pretense of needing fresh water; and while thus sailing, the vessel was captured, and vessel and cargo were condemned.

> " 'The act of the master, in sailing to the Isle of France, with articles contraband of war, under pretense of a want of water, was a fraudulent act, and

from the testimony in the case, there is every reason to conclude that this was the original destination of the ship, known to the owner, though concealed from the seamen. The contract entered into with the seamen was not kept with good faith. A deceit was practiced upon them. The ship and freight were justly lost by a willful violation of neutral duty, and the seamen had the soundest claim upon the owner for an equitable compensation.' "[8]

While this was not an admiralty court decision, it is obvious from the subsequent opinion of the district court in *Williams v. The Sylph,* SDNY, 1841, 29 Fed. Cas. No. 17,740, pp. 1407, 1408, 1409, that the Federal court would have held the same.

B. The appellees have a maritime lien for their damages

Appellants take the position that fishermen on shares, who have been wrongfully discharged, have no maritime lien for their damages, under either of two conditions (see page 7, *supra*):

(a) if the damages relate to prospective earnings after the date the vessel was attached; or

(b) if the measure of damages is speculative.

1. Judicial attachment does not defeat a seaman's lien for damages from wrongful discharge

For the first proposition, appellants cite *Sigurjonsson v. Trans-American Traders,* 5th Cir., 1951, 188 F.2d 760, and *Vlavianos v. The Cypress,* 4th Cir., 1948, 171

[8] Quotation taken from *Van Buren v. Wilson,* 9 Cowen 158, 18 Am. Dec. 491, 494, 495.

F.2d 435, cert. den., 337 U.S. 924, 69 S.Ct. 1168, 1171, 93 L.Ed. 1732.

But in the first of these cases the court particularly found that there had been no wrongful discharge, and in the second the court did what appellants say it cannot do.

The crew libeled the ship. The Court of Appeals says:

> "[The statutory penalty for wrongful discharge] should be liberally applied especially when, as in this case, the abandonment of the voyage and the discharge of the crew were occasioned by no fault on their part but by the failure of the owner to make the necessary provision for the voyage. It is true that the ship was taken into custody by reason of the libel filed by the crew, but the libel was filed after the men had been notified by the owner that the ship would not sail. It is obvious that the abandonment of the voyage was not due to the libel but to the owner's financial difficulties which compelled him to break his contract." *Vlavianos v. The Cypress,* 171 F.2d 435, 439.

It is, of course, generally true that no maritime lien arises for wages (or equivalent shares) earned after judicial attachment of the vessel. But damages for wrongful discharge spring from the wrong—they are not accrued compensation.

Williston, in a section dealing with employee's recovery where trial precedes the expiration of contract, quotes the following from a leading Massachusetts case, concluding that it represents the weight of authority in the United States:

> "The plaintiff's cause of action accrued when he was wrongfully discharged. His suit is not for

wages, but for damages for the breach of his contract by the defendant.''[9] 5 Williston on Contracts (Rev. Ed. 1937) §1362, pp. 3821, 3822.

Admiralty courts have followed the same reasoning in allowing damages for wrongful discharge although the vessel was seized before the seaman's term had expired.

The Lakeport, WDNY, 1926, 15 F.2d 575;

The Heroe, D. Dela., 1884, 21 Fed. 525;

The Wanderer, C.C., D.La., 1880, 20 Fed. 655;

The Hudson, SDNY, 1846, 12 Fed. Cas. No. 6,831, p. 805.

Judge Parker explicitly states the matter in his dissenting opinion in *Old Point Fish Co., Inc., v. Haywood,* 4 Cir., 1940, 109 F.2d 703, 707, 708:

''There can be no question but that a sharesman under a fishing lay is entitled to the usual maritime lien for seamen's wages upon the ship, as well as upon the catch or cargo. 56 C.J. 1065 and cases cited. The seizure of the vessel resulting in a breaking up of the voyage entitled him to any amount previously earned and to damages due to the discharge. * * * No distinction can properly be drawn, with respect to the right of lien, between claim for wages earned under a contract and claim for damages arising from discharge in violation of its terms. The lien for wages covers the entire term of employment contracted for. 56 C.J. 1053; The Wanderer, C.C., 20 F. 655. And certainly the sea-

[9] *Cutter v. Gillette,* 163 Mass. 95, 97, 39 N.E. 1010; numerous supporting decisions are cited, 5 Williston on Contracts (Rev. Ed. 1937), p. 3822, n. 3.

man's rights thereunder may not be defeated without fault on his part. He cannot, of course, be accorded lien for wages accruing subsequent to seizure for the reason that lien may not be created on the vessel after it has passed out of the control of the owners; but this does not mean that he may not have a lien for the damages resulting from the breach of his contract occasioned by the seizure."

There are, of course, other cases where the statutory wage penalty (46 U.S.C., §594), for discharge without fault, comes into play.[10] This equivalent compensation has been allowed as a lien ranking with wages, both where the vessel has been attached by other lien creditors, *e.g., The Great Canton,* EDNY, 1924, 299 Fed. 953, and where the vessel has been attached at the instance of the crewmembers themselves, *e.g., Vlavianos v. The Cypress,* 4th Cir., 1948, 171 F.2d 435.

In the case now before this Court, the appellees were wrongfully discharged no later than June 7, 1954 (Finding XV, Tr. 67), and Lower's libel on June 10 did *not* break up the voyage. The liens had already arisen, not from the attachment, but from the preceding wrongful discharges.

2. Appellees were entitled to damages even though their shares were prospective

Appellant's second argument is that no lien arises because the fishing shares are speculative.

This manifestly confuses the question of lien with the question of provable damages. If the damages are there,

[10]This penalty is not available to fishermen on shares. *Old Point Fish Co., Inc., v. Haywood,* 4th Cir., 1940, 109 F.2d 703.

the lien follows as a matter of course. The following cited cases demonstrate this sufficiently.

The important question is whether fishermen on shares, who are wrongfully discharged before there is any catch, have any basis for proving damages.

We respectfully submit that the courts have traditionally resorted to estimates and averages to fix prospective shares as a measure of damages, and that the trial court here followed this pattern properly.

The several situations in which such prospective shares have been established are these:

(a) *Only one or two members leave the crew.*

The catch actually made by the other fishermen on the vessel is accepted as the measure.

> *Mason v. Evanisevich,* 9th Cir., 1942, 131 F.2d 858 (fisherman injured at beginning of season);
>
> *The Betsy Ross,* 9th Cir., 1944, 145 F.2d 688 (same situation);
>
> *The American Beauty,* W.D. Wash., 1924, 295 Fed. 513 (fishermen wrongfully discharged during season).

(b) *The season is interrupted temporarily.*

The catch made by a similar vessel during the detention period has been accepted as a fair measure of the prospective catch.

> *Van Camp Sea Food Co. v. Di Leva,* 9th Cir., 1948, 171 F.2d 454 (collision).

In two similar cases the courts resorted to averages.

In *The Mary Steele,* D. Mass., 1874, 16 Fed. Cas. No.

3,035, pp. 1003, 1005, Judge Lowell thought he "ought to take a rather low average" of the vessel's past trips, in estimating the lost catch.

In *The Risoluto* (1883) 5 Asp. Mar. Cas. 93, where there was a long detention, the court approved estimated damages based upon the average catches of other boats on the same fishing grounds. The claimant there made the same protest which appellants make here.

In still another similar case, *The Columbia,* EDNY, 1877, 6 Fed. Cas. No. 3,035, p. 173, Judge Benedict approved without discussion damages based upon evidence of "the probable amount of menhaden" the schooner would have caught during the detention.

Carbone v. Ursich, 9th Cir., 1953, 209 F.2d 178 (collision), had no express sum of damages to consider. The only measure mentioned is "loss of prospective catches of fish during the period." 209 F.2d 179. However, the court does refer to the cases listed above.

(c) *The voyage is abandoned prematurely.*

In *The Page,* D. Cal., 1878, 18 Fed. Cas. No. 10,660, p. 997, a case of wrongful discharge, the master breached his contract with the crew by negligently failing to provide enough salt. The court estimated the catch "to the time when it might have been reasonably and properly brought to a conclusion," based upon what the men had already caught.

Judge Benedict, in a case where master and crew were wrongfully discharged after only a few weeks of service, adopted the same measure of estimate, past catch. *Fee v. Orient Fertilizing Co.,* EDNY, 1888, 36

Fed. 509, aff'd. sub nom. *Fee v. Orient Guano Manf'g. Co.*, CC, 1890, 44 Fed. 430.

(d) *The voyage breaks up before there is any catch.*

In only one case we find, where the voyage was broken up before any shares were earned, has there been occasion to award damages. In that case this court accepted season average as the measure of probable earnings, without question.

United States v. Laflin, 9th Cir., 1928, 24 F.2d 683, concerned a trading and whaling voyage stopped, apparently before the whaling got under way, by seizure of the vessel for alleged unlawful sealing.

The proof of loss was evidence showing the amount of profits which would have been earned had the seizure not occurred, and the probable catch of whales, during the season. The average amounts of bone and oil taken from whales of the species involved, and the average market price of oil and whalebone in that season, were shown; from which sums were deducted the "usual" costs of outfiting and operating, and a sum for depreciation. 24 F.2d 684.

This measure of loss of a prospective whaling season was not questioned by appellant in that case, apparently.

In *Old Point Fish Co., Inc., v. Haywood,* 4th Cir., 1940, 109 F.2d 703, upon which appellants so strongly rely, the majority held that the arrest of the vessel at the instance of a repairman broke up the voyage without effecting a wrongful discharge, and damages were not recoverable. The court intimated that it would not

award damages anyway, since the prospective *profits* of the crewmembers were wholly speculative.[11]

Judge Parker, of course, disagreed.

We emphasized the word profit because in the instant case, unlike *Old Point Fish Co.,* the crewmembers were to receive a share of the *gross catch* (Findings III, V, VII, IX, XI, Tr. 64, 65, 66). Profit, of course, includes a substantial element of added conjecture not present here.

For this reason, also, we omit discussion of the Washington State decisions listed on pages 24 and 25 of appellants' brief, since they deal with loss of prospective *profits* to a business.[12]

In *Williams v. The Sylph,* SDNY, 1841, 29 Fed. Cas. No. 17,740, p. 1407, upon which appellants also rely, the master committed barratry. Damages were refused the crew because the court would not penalize the shipowner for a wrong done by the master so obviously outside his agency. Moreover, the court suspected the crew of giving the master a hand in his "malconduct." The important point in this case is that, had the owner been

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[11]The court referred to *Laflin* with approval, apparently not recognizing that its general condemnation of prospective catch as a measure of damages was in conflict with the decision in this Circuit. Unfortunately the issue was confused because the trial court had awarded damages by analogy to 46 USC, §594, and apparently there had been no cross-appeal.

[12]Three of these cases involved experimental products. The other, *Webster v. Beau,* 1914, 77 Wash. 444, 137 Pac. 1013, concerned a proposed future trading venture north of the Arctic circle, "in a remote and sparsely settled country, under dangerous and adverse conditions." 77 Wash. 449, 137 Pac. 1015.

guilty of breaking up the voyage, the court would have awarded damages.[13]

Reed v. Hussey, DCNY, 1836, 20 Fed. Cas. No. 646, the remaining case cited by appellants, is not apropos.

The general principle with which the court is here concerned is well summarized in *Gayner v. The New Orleans,* ND Cal, 1944, 54 F.Supp. 25, 28.

> "That the consideration for libelants' services might be other employment, rather than cash payments, thus resulting in uncertainty in the amount of libelants' claim, does not, in my opinion, destroy their maritime lien. So long as the compensation may be translated into money or its equivalent, the lien is effective. Mere uncertainty or difficulty in calculation does not destroy the right. Equity will provide the means for ascertainment of amounts. The Bouker No. 2, 2 Cir., 241 F. 831, 834. Admiralty courts 'act upon the enlarged and liberal jurisprudence of courts of equity; and, in short, so far as their powers extend, they act as courts of equity.' Judge Story in Brown v. Lull, 4 Fed. Cas. pages 407, 409, No. 2,018."

The rule in a civil action would be similar. 5 Williston on Contracts (Rev. Ed. 1937), §1358, Employee's damages for wrongful discharge, pp. 3810, 3811.

The mere fact that there are probabilities to be weighed does not preclude an admiralty court from estimating damages.

The trial court took the only reasonable criterion available

In this case there were no other crewmembers to continue the season; there was no other single vessel to

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[13]See reference to *Hoyt v. Wildfire,* at 29 Fed. Cas., p. 1409.

establish an analogous catch; there were no previous catches by the crew to afford a guide. There was a wrongful discharge and a clear demand for equitable compensation.

The terms of hiring were clearly made out. We knew that (had those terms been fulfilled by the vessel owner) a bait boat of given size and tonnage, with some experienced tuna fishermen aboard, would have been fishing the 1954 tuna season off the coast of Southern California, an established fishing ground. The marketing arrangements had been made with a well known fish company. Fish were actually abundant, and the annual average market price actually bettered in 1954.

Under these circumstances the court took an expert's estimate of the *minimum* average catch for vessels of like tonnage, fishing in the same waters, as established during a number of years, as the appropriate measure of damages.

We submit that this is a reasonable measure, consistent with the formula taken by this court in *United States v. Laflin, supra,* and that the trial court's judgment in the matter ought to be accepted.

CONCLUSION

We respectfully submit that the trial court rightly decided this case in favor of the crewmembers of the Silver Spray, and that its decree ought to be affirmed.

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